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Nancy M. Morris
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: SR-NASD-2006-088
Proposed NASD Rule 12504-Dispositive Motions

Dear Ms. Morris:

I am an attorney in New York principally engaged in the practice of arbitration before the NASD, NYSE, AAA and NFA. I am also an NASD and NYSE arbitrator, a member of the Board of Directors of Public Investors Arbitration Bar Association ("PIABA"), a member of the Securities and Exchanges Committee of the New York State Bar Association Committee on Securities and Exchanges, a member of the Legal and Compliance Division of the Securities Industry Association ("SIA"). I have engaged in all or most of these activities for the past 15 years, representing both the industry and individual investors in arbitration and class action litigation.

As a member of PIABA, I support the position of PIABA relating to the above rule; however, provide the following additional experiences and observations.

A. The Demise of Investor Protection

Since the filing if the proposed changes to the NASD Code relating to dispositive motions, my office has received a dispositive motion in virtually every case. This increases the potential costs of each case to each client, as each motion must be addressed and a costly hearing must also be held with the full panel. Dispositive motions are in derogation of the NASD's mandate as a self-regulatory organization sanctioned by the SEC to carry out important responsibilities for investor protection that the SEC has delegated to it. The frequency of sanctions, attorneys' fees and costs being assessed against a party filing a frivolous motion are virtually non-existent and a study should be mandated before any rule such as this is accepted and public investors are greatly burdened to benefit extremely rare and extraordinary circumstances.

Any seeming benefits of a dispositive motion rule would be greatly outweighed by the burdens of frivolous motion practice and there are other remedies that an arbitration panel can impose in the extremely rare and extraordinary circumstances that may warrant an early dismissal and shifting of costs, without eradicating a public investors' right to an evidentiary hearing, as there is limited discovery and no depositions in arbitration.

The rule proffered does not protect public investors; instead, these motions are and continue to be used to intimidate public investors and mislead arbitration panels, many of whom are non-lawyers.

B. Disparity in Forums and Limited Access

The New York Stock Exchange's Arbitration Department understands this position clearly and does not permit dismissal before an evidentiary hearing; thus, the NASD's rule will cause a disparity in the treatment of public investors in various forums. Moreover, as all broker/dealers and investment professionals are NASD members, but not all are NYSE members, investors will not all have equal access and choices in the process. There will be two classes of claims and public investors will be greatly challenged by the onslaught of motions by the smaller firms that are only NASD members and provide the greatest risk to the public investors in collection efforts if proceedings against smaller and more thinly funded entities are delayed and burdened by costly motion practice. Note that EVERY time this office has received a dispositive motion, opposing counsel has argued the discovery and the proceedings should be delayed pending resolution of the motion, adding months onto the start of every case.

Public customers in dealing with every broker/dealer in the industry - without exception - have no choice but to arbitrate their disputes in a self-regulated industry forum created, maintained and funded by the industry. Public customers have no right to go to third party arbitration forums. The NASD is a constituency of its members, the broker dealers that pay their dues to the NASD entity. The industry has and wants to maintain control of the process; it is obvious and undisputable, that public customers did not create the arbitration rules and have little impact on positive changes. Instead, the industry has continuously advocated new rules that benefit only the industry and only the NASD is caving into these pressures from the industry alone without regard for the investing public's interests, which the SEC should question. For example, the new rule could, but does not, provide mechanisms for motion practice to dismiss meritless defenses. This clearly illustrates that this rule is simply not balanced or fair and only seeks to protect one side of the market, the industry over the public investor.

With the input of PIABA, the North American Association of Securities Administrators ("NAASA") and the arbitration clinics at various law schools that have grown significantly in number over the past few years, public investors now have any opportunity to provide thoughtful and organized legal input into changes to the rules the industry alone created, but their input into these matters is limited and they are often finding themselves having to react to proposed changes and severely compromise what would be their most favored position, so that at least they can limit the burdens the industry seeks to place upon the process and public investors.

Public investors are rarely consulted in any meaningful way to find out how the procedures can be made fairer for their interests and there are currently no independent efforts or attempts to address before the SEC in conjunction with the NASD's current rule filing of the obvious problems associated with the NASD's simple proffering of this rule. As referenced in PIABA's comment letter, the industry sees this proposed rule itself as a new opportunity to burden the investing public and file a motion in every case (as has been the experience at this firm), i.e., what has the NASD done to advise the SEC as to the current onslaught of frivolous motion to dismiss practice as a result of simply proffering this rule? It behooves the SEC to question the NASD in this regard to protect the investing public. It will surely get worse if this rule is passed. The SEC should require the NASD to report on the current status of such motions before this proposal is approved. It would further be interesting to know how this proposed rule originated, as it was clearly not originated or demanded by the investing public. Now that the public has mechanisms in place for comment through NASAA and PIABA, the NASD is attempting to limit access to an available forum for redress.

Particularly troubling, at the same time that the NASD seeks to pass this rule, they are also proposing SR-NASD-2006-109, attempting to allow for non-practicing lawyers to represent parties at a hearing, as well as seemingly to over-ride state law, in allowing an attorney from any jurisdiction to practice in any state in which the NASD has an office. This rule is again clearly designed to protect the industry, particularly in-house staff, allowing firms to be represented by non-lawyers that have no ethical obligations or formal legal training designed to prevent frivolous motion practice, advancing legal positions that are without merit and discovery abuse.

On the other hand, the dispositive motion rule burdens public investors that are not represented by attorneys, as well as those public investors who are assigned panels that are dominated by non-lawyers and non-judges. Having an arbitration panel, as opposed to a well trained and aptly appointed judge dismiss a case presents real dangers that the law will be misapplied in this "equitable" forum, with none of the safeguards in the legal system, such as the right to appeal such a dismissal on legal grounds that exists in court and for two full levels or formal legal appeal above <u>every</u> trial court. A motion to vacate simply does not provide the same safeguards; thus, a legally viable claim could be dismissed in arbitration under this rule without a reasoned decision and it would be impossible to vacate the decision.

The benefit of arbitration to customers is the absence of technical defenses, avoidance of motions practice and the ability to get a claim heard on the merits and after testimony on the basis of whether the client's treatment by the firm comported with standards of fairness and equity. By law in most jurisdictions, and even historically in New York – a notoriously tough state by all standards, parties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations. <u>Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.</u>, 20 F.R.D. 359, 362 (S.D.N.Y. 1957). That benefit should not be taken away from investors.

Granting changes to the code that would sanction dispositive motions, such as this, would exceed the powers of the arbitrators under the Federal Arbitration Act, 9 U.S.C. Sec. 10 (a) (4), unless the parties agreed to have their fate decided by motion. Moreover, it is a counter-intuitive to the expeditious nature of arbitration to add significant motion practice, as a decision incorporating a dismissal prior to a hearing may be vacated. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)(Award set aside "[w]here the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.").

Motion practice is contrary to the expeditious aspirations and fairness requirements of the Arbitration Rules and the Federal Arbitration Act. The current rule, as proposed, will radically change the process and is a marked step in the wrong direction. It would likely delay and weaken investors already limited arbitral rights and cause additional expense, giving the industry more leverage, especially against some of the most worthy of claimants, the elderly public investors, who are common and easy targets of wrongful conduct, but who cannot withstand a long and expensive process.

In Shearson/American Express Inc. et al.v. McMahon et al., 482 U.S. 220, 233-234 (1987) ("Shearson"), the foundation for securities arbitration, the Court made two important points:

> In short, the Commission has broad authority to oversee and to [482 U.S. 220, 234] regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.[1]

The Federal Arbitration Act is not served when the investor is powerless and has no right to go to independent third party arbitration forums with alternative selection methods created by non-industry, neutral arbitration forms. It is shameful, however, when public customers and their advocates who have and are participating in an existing system with no meaningful choice but to have their claims heard in that system are shut out from giving input into important changes to it.

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[1] As cited in Shearson, fn. 3, Senator Williams, Chairman of the Subcommittee on the amendments to RICO, in speaking of treble damages (we wish), observed:

> "This legislation represents the product of nearly 4 years of studies, investigations, and hearings. It has been carefully designed to improve the efficiency of the securities markets and **to increase investor protection**. It is reform legislation in the very best sense, for it will lay the foundation for a stronger and more profitable securities industry **while assuring that investors are more economically and effectively served**."

Hearings on S. 30 and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 1 (1970).

Thank you for your consideration.

Very truly yours,

Jenice L. Malecki